

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	CG Docket No. 02-278
Rules and Regulations Implementing the)	CG Docket No. 05-338
Telephone Consumer Protection Act of 1991)	DA 17-144
)	
Petition for Rulemaking and Declaratory Ruling)	
of Craig Moskowitz and Craig Cunningham)	

Comments of Professional Association for Customer Engagement

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I. Introduction

Every day in America tens of thousands of consumers receive vital phone calls and text messages alerting them to the need to refill a prescription, pick up a package or take some other important step in their daily life. These messages may be sent by businesses to consumers because the Federal Communications Commission (“FCC” or “Commission”) has recognized for nearly 25 years that when a consumer provides their phone number to a business they have given that business prior express consent (“PEC”) to call them at that number using an automatic telephone dialing system (“ATDS”) or a prerecorded message. Now, petitioners and professional plaintiffs Craig Moskowitz and Craig Cunningham (“Petitioners”) request the Commission undo this long-standing interpretation and impose onerous written consent requirements on the types of informational communications consumers rely on to better manage their lives. Their Petition¹ places additional hurdles to consumers’ access to information, runs counter to the public interest, does not comport with Congress’ intent when enacting the Telephone Consumer Protection Act (“TCPA”)² and would only benefit professional plaintiffs and class action attorneys who attempt to snare businesses in technicality traps.

The Professional Association for Customer Engagement (“PACE”) respectfully requests that the Commission deny the Petition and maintain the existing PEC standard. This standard facilitates communication of important and helpful information to consumers which is in the public interest and aligns with Congressional intent. Also, because of the significant impact any action on the Petition will have in the current unsettled TCPA regulatory environment, PACE respectfully requests that the Commission hold any action on the Petition in abeyance until both (i) *ACA International, et al. v. FCC*³ has been fully adjudicated and the Commission has completed any necessary actions on remand, and (ii) the Commission has completed its ten-year rule review process.⁴

¹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Petition for Rulemaking and Declaratory Ruling of Craig Moskowitz and Craig Cunningham*, CG Docket Nos. 02-278, 05-338 (filed Jan. 22, 2017).

² Codified at 47 U.S.C. § 227; implementing regulations at 47 C.F.R. § 64.1200.

³ *ACA International, et al. v. FCC*, Case No. 15-1211 (D.C. Cir.).

⁴ See 82 Fed. Reg. 9282, 9293 (Feb. 3, 2017).

II. Petitioners Seek to Overturn 25 Years of Precedent Relied Upon by Businesses and Consumers Alike

As noted by Commissioner Pai (now Chairman Pai) in 2015, “Congress passed the [TCPA] to crack down on intrusive telemarketers and over-the-phone scam artists.”⁵ Generally, the TCPA prohibits, subject to limited exemptions, calls to cell phones using an ATDS or prerecorded message without the called party’s PEC.⁶ Under Commission regulations, prior express written consent (“PEWC”) is required for such calls if made for telemarketing or advertising purposes.⁷

Congress did not define PEC in the TCPA, thereby leaving it to the Commission to define the term. The Commission did so in its *1992 Report and Order* (“1992 Order”) stating, “persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.”⁸ This common sense interpretation that voluntarily providing one’s phone number constitutes PEC has stood for 25 years and been repeatedly reaffirmed. In 2008, the Commission reiterated that “the provision of a cell phone number to a creditor, e.g. as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that number regarding the debt.”⁹ In 2012, when the Commission added the requirement for PEWC for certain telemarketing calls, it specifically retained the PEC standard for non-telemarketing calls.¹⁰ The Commission again readopted the existing PEC standard in its FCC’s 2015 Omnibus Declaratory Ruling and Order.¹¹ Time and time again the FCC maintained its PEC standard for non-telemarketing calls and American businesses, charities and citizens have relied upon this interpretation.

⁵ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, WC Docket No. 07-135, FCC 15-72 (rel. July 15, 2015) (“2015 Order”), *Dissenting Statement of Commissioner Ajit Pai* at 8072.

⁶ 47 U.S.C. § 227(b)(1)(A)(iii).

⁷ 47 C.F.R. § 64.1200(a)(2).

⁸ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CC Docket No. 92-90, FCC 92-443, ¶ 33 (rel. Oct. 26, 1992).

⁹ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC 07-232, ¶ 9 (rel. Jan. 4, 2008) (“2008 Order”).

¹⁰ *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, FCC 12-21, ¶ 21 (rel. Feb. 15, 2012) (“2012 Order”) (“While a few commenters argue that we should require written consent for all autodialed or prerecorded calls (i.e., not simply those delivering marketing messages), we conclude that requiring prior express written consent for all such calls would unnecessarily restrict consumer access to information communicated through purely informational calls.”).

¹¹ *2015 Order* at ¶ 52.

III. Denying Petition Serves the Public Interest

Businesses and consumers have built mutually-beneficial communicative relationships based on the PEC standard. In today's hyper-connected world where over 377,000,000 wireless devices are in use and 49.3% of households are wireless-only,¹² many consumers expect businesses to communicate important information to them on a regular basis. Informational calls/texts remind consumers of appointments, inform them that their table is ready at a restaurant or even provide information essential to protecting consumers' health or financial well-being. A few hypothetical situations may illuminate the importance of these communications:

- Martha is an 80-year-old grandmother who suffers from a life-threatening illness that is kept in check by specialized medication. If Martha goes without her medication, she could suffer significant health effects. Because her medication is specialized, it is not kept in stock and must be ordered several days in advance. Martha is sometimes a little forgetful and may not remember to reorder her medication on time. Thankfully, her pharmacy calls her with a reminder message that makes sure she reorders and does not run out.
- Jake owns and operates a small business in rural America. His business is growing but not yet stable enough that Jake can afford a significant financial shock. Like any business owner, he is very busy helping customers and trying to keep his head above water. One day Jake receives an alert from his bank that his credit card account may have been compromised. He immediately investigates and discovers thousands of dollars' worth of fraudulent charges. Because of the fraud alert from his bank, he is quickly able to dispute the charges, close the account and open a new account without suffering expensive overage charges.¹³
- Anna recently graduated college and has been applying for jobs with various companies. She mailed her résumé to a local design firm and they decided to bring her in for an interview. Knowing that Anna listed a cell phone number on her résumé (it's the only phone she has), the firm's HR director calls Anna to coordinate the interview. Anna enthusiastically responds and gets the job a few days later.
- Cynthia lives in an apartment community that recently experienced several break-ins and package thefts. She ordered a present for her daughter from an online retailer. Because the package may be delivered while she is at work, she asks a neighbor to retrieve it from her doorstep if it is delivered. While at the office, Cynthia receives a text message from the seller informing her that her package was delivered. She calls her neighbor who retrieves the package, keeping it safe from thieves.

¹² CTIA's *Wireless Industry Summary Report, Year-End 2015 Results*, available at <http://www.ctia.org/industry-data/ctia-annual-wireless-industry-survey> (last accessed Feb. 22, 2017).

¹³ PACE recognizes that the Commission created a narrow exemption for fraud alerts, however, because of the onerous requirements imposed on the exemption it is not an effective tool for businesses. *2015 Order* at ¶ 138.

The above scenarios demonstrate why consumers benefit from the free flow of informative calls/texts.

In fact, not only do consumers benefit from informational calls/texts, they want these types of timely and relevant communications. Commissioner O’Rielly reported in his dissent to the 2015 Order relevant statistics that validate consumers’ appreciation of timely and helpful information. For example, one healthcare company reported that its opt-out rate for non-telemarketing calls is only approximately 0.35%.¹⁴ A school district reported that in about a year, it made over 2.7 million phone calls placed to a phone contact population of 449,909 and only processed 634 opt-out requests (0.14% of the phone contact population).¹⁵ Such low opt-out rates demonstrate that consumers desire informational calls/texts.

Petitioners seek to cut-off consumers from informational messages sent via an ATDS or prerecorded message unless the sender obtains PEWC or an equally onerous oral express consent.¹⁶ Requiring PEWC for informational messages would effectively terminate business’ ability to communicate with consumers and consumers’ ability to receive timely and relevant information.

At first glance, such a far-reaching implication may seem absurd, but it is the most likely scenario in the current TCPA regulatory environment. In its 2015 Order, the Commission greatly expanded the definition of an ATDS by holding that “the capacity of an autodialer is not limited to its current configuration but also includes its potential functionalities.”¹⁷ And while the Commission acknowledged that there may be a limit to what equipment constitutes an ATDS based on its ability to be modified to function as one, the Commission only identified a rotary-dial

¹⁴ 2015 Order, *Statement of Commissioner Michael O’Rielly Dissenting In Part and Approving In Part* at 8086 (citing Anthem Apr. 6, 2015 Ex Parte Letter at 6).

¹⁵ *Id.* (citing Declaration of Maribeth Luftglass, Assistant Superintendent and Chief Information Officer, Fairfax County Public Schools, in Support of Reply Comments of Blackboard Inc., CG Docket No. 02-278, at 2 (dated May 7, 2015)).

¹⁶ *Petition* at 37. Petitioners suggest that tax-exempt nonprofit organization calls and calls that deliver certain types of health care messages could be exempted. *Id.* When the FCC begins drawing lines between messages based on their content, the FCC engages in content-based restrictions of speech which require strict Constitutional scrutiny. See *U.S. v. Playboy Entm’t Group*, 529 U.S. 803, 813 (May 22, 2000) (citing *Stable Communications of Cal., Inc. v. FCC*, 492 U.S. 115) (“Since § 505 is a content-based speech restriction, it can stand only if it satisfies strict scrutiny. If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.”).

¹⁷ 2015 Order at ¶ 16.

phone as safe.¹⁸ Under such a broad standard, a court could conceivably find that a soft phone, desk phone or even a smart phone constitute an ATDS if it could be modified through the addition of software and/or hardware to have the requisite functionality.¹⁹ In other words, applying the Petitioners' request in conjunction with the current definition of an ATDS would require callers to obtain PEWC for almost every call made in America or risk TCPA liability.

Although businesses could, in theory, obtain PEWC through opt-in campaigns for informational calls, this option is simply unworkable in practice. First, small businesses likely would not have the technological resources to properly obtain and track PEWC for every called party. For example, you walk into your local bistro for Sunday brunch and there is a long wait. The hostess takes your number and offers to text you when a table is ready so that you can walk around the neighborhood and do some shopping. It is unlikely that the bistro has the resources to devote to a consent obtaining mechanism and database to track PEWC and, even if they did, you probably would not want to go through the hassle of providing consent just to get a text that your table is ready. Likewise, if you call the local hardware store to ask about an installation appointment and they need to call you back, they likely do not have an expensive call recording system to record and maintain your oral consent. Put simply, a PEWC requirement would be not only an expensive detriment to small businesses, but also a significant hassle to consumers.

Second, obtaining consent would be socially inappropriate in certain circumstances. Consider, for example, the way individuals interact at a typical networking event or industry convention. Attendees will share contact information (often including a cell phone number) with other attendees by giving them a business card. A card recipient would insult the card provider if they asked for a signed consent form to later call/text the provider because the provider clearly indicated their consent to be called by giving the recipient their card. Imposing PEWC in this context is both onerous and against social convention.

Third, many businesses rely on third-parties to collect enrollment or contact information on their behalf. One of the most obvious examples of this is employer-sponsored health insurance enrollment. Employers typically collect the application for enrollment and provide it to the insurer.

¹⁸ *Id.* at ¶ 18.

¹⁹ Chairman Pai presciently identified the potential scope of the new ATDS interpretation in his dissent to the 2015 Order: "So under the *Order's* reading of the TCPA, each and every smartphone, tablet, VoIP phone, calling app, texting app—pretty much any calling device or software-enabled feature that's not a 'rotary-dial phone'—is an automatic telephone dialing system." *2015 Order, Pai Dissent* at 8075.

After the initial enrollment, the employer may update contact information with the insurer without collecting a new application. If the insurer is required to obtain PEWC from the enrollee every time the enrollee updates their contact information, the insurer will be forced to modify its entire employer-based information gathering system. Other businesses that rely on third-parties to collect contact information would face similar upheavals to their processes.

Fourth, given the high risk of TCPA litigation, many businesses will choose not to send informational calls/texts if PEWC is required. As reported by WebRecon LLC, litigants filed 4,860 TCPA lawsuits in 2016 which is more than the number of TCPA lawsuits filed in 2007-2013 combined.²⁰ Between just 2015 and 2016 TCPA filings increased 31.8%.²¹ Recent reported settlements have reached as high as \$75,000,000.²² In the face of a cottage industry of TCPA lawsuits and a complicated regulatory structure rife with opportunities for inadvertent errors, many companies will choose to forego messaging consumers rather than risk a multi-million dollar lawsuit.

Petitioners PEC “alternative” would be the functional equivalent of PEWC in practice.²³ Under Petitioners’ alternative definition of PEC, the caller would be required to provide all of the PEWC disclosures and obtain the consumer’s express consent.²⁴ Although the caller would not be required to obtain a signed writing, because the caller must prove consent²⁵ it would need to maintain a system to track that it provided disclosures and the called party orally consented. These enhanced PEC requirements would place businesses at the same level of risk and result in the same types of barriers as the proposed PEWC requirement.

By denying the Petition, the FCC will act in the public interest and preserve the free flow of communications between businesses and the consumers they serve. Consumers who need

²⁰ *2016 Year in Review: FDCPA Down, FCRA & TCPA Up* (WebRecon LLC, Jan. 24, 2017), available at <https://webrecon.com/2016-year-in-review-fdcpa-down-fcra-tcpa-up/> (last accessed Feb. 22, 2017).

²¹ *Id.*

²² *\$75M Capital One TCPA Class Deal OK’d; Attorneys’ Fees Cut from \$22M to \$15M* (Bloomberg BNA, Feb. 23, 2015), available at <https://www.bna.com/75m-capital-one-n17179923290/> (last accessed Feb. 22, 2017).

²³ *Petition* at 38, 58.

²⁴ *Petition* at 58.

²⁵ See e.g., *Chyba v. First Fin. Asset Mgmt.*, 2013 U.S. Dist. LEXIS 165276, **28-29 (S.D. Cal. Nov. 20, 2013)(citing *Robbins v. Coca-Cola-Co.*, 2013 U.S. Dist. LEXIS 72725, 2013 WL 2252646, *2 (S.D. Cal. May 22, 2013)) (“Prior express consent is an affirmative defense to be raised and proved by a TCPA defendant.”); *2015 Order* at ¶ 81 (“We reiterate that the TCPA places no affirmative obligation on a called party to opt out of calls to which he or she never consented; the TCPA places responsibility on the caller alone to ensure that he or she have valid consent for each call made using an autodialer, artificial voice, or prerecorded voice.”).

prescription reminders, who want fraud alerts or who desire to know that their packages have been delivered safely will be able to continue to get that information in a timely matter. Most importantly, the TCPA will not be used as a tool to chill legitimate speech while padding the wallets of the plaintiffs' bar and, as Chairman Pai has acknowledged, "one need not be versed in the canon of constitutional avoidance to know that courts and administrative agencies normally eschew statutory interpretations that chill the speech of every American that owns a phone."²⁶

IV. Denying Petition Aligns with Congressional Intent

The Commission's denial of the Petition will also align with and fulfill Congress' goal in passing the TCPA. Congress never intended for the TCPA to act as a bar to normal business communications. To the contrary, the TCPA is supposed to "balance[e] the privacy rights of the individual and the commercial speech rights of the telemarketer."²⁷ It was never intended to interfere with "expected or desired communications between businesses and their customers."²⁸ Yet interference is precisely what will happen if the Petition is granted.

Congress did not define PEC in the TCPA, thereby giving the Commission discretion to determine what PEC requires. As previously explained, the Commission determined that "persons who knowingly release their phone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary."²⁹ This standard is supported by the Congressional record which notes that "the called party has in essence requested the contact by providing the caller with their telephone number for use in normal business communications."³⁰ Common sense dictates that when a person voluntarily takes the step of providing their phone number to another party, they have expressly consented to be called/texted by that party – otherwise providing someone with a phone number would be a meaningless exercise.

For nearly 25 years, the FCC has continually revalidated that the act of giving a phone number to a person is giving consent to be called at that number.³¹ The Commission's balanced

²⁶ *2015 Order, Pai Dissent* at 8076.

²⁷ *Report of the Energy and Commerce Committee of the U.S. House of Representatives*, H.R. Rep. 102-317, at 10 (1991) ("House Report").

²⁸ *House Report* at 17.

²⁹ *1992 Order* at ¶ 33.

³⁰ *House Report* at 13.

³¹ *See e.g. 2008 Order* at ¶ 9 ("We conclude that the provision of a cell phone number to a creditor, e.g., as part of a credit application, reasonably evidences prior express consent by the cell phone subscriber to be contacted at that

approach to the consent required for non-telemarketing communications aligns with Congress' expectation that the TCPA should not prevent expected or desired communications between businesses and their customers. If the Commission grants the Petition, it will greatly chill informational communications between businesses and consumers. Only by denying the Petition can the Commission continue to fulfill Congress' intent.

V. Conclusion

At certain times, inaction is a better course than action. This is one of those times. Over the past several years TCPA regulations grew more convoluted and complicated as the Commission attempted to shoe horn changes into a structure that was never designed for them. Given the seriousness of this Petition and the profound impact any action on it would have,³² PACE respectfully urges the Commission to hold it in abeyance until several other serious TCPA matters are resolved. Specifically, because of the impact of the ATDS definition on all TCPA-related regulations and the Commission's upcoming opportunity for a wide-ranging regulatory review, the Commission should not act on the Petition until (i) *ACA International, et al. v. FCC* has been fully adjudicated and the Commission has completed any required actions on remand, and (ii) the Commission has completed its ten-year regulatory review.

When the time comes to act on the Petition, PACE respectfully requests that the Commission deny it in its entirety.³³ The Commission's denial of the Petition will demonstrate its commitment to serving the public interest and fulfilling Congress' intent in passing the TCPA.

number regarding the debt."); *2012 Order* at ¶ 21 (...we conclude that requiring prior express written consent for all such calls would unnecessarily restrict consumer access to information communicated through purely informational calls."); *2015 Order* at ¶ 52 ("For non-telemarketing and non-advertising calls, express consent can be demonstrated by the called party giving prior express oral or written consent or, in the absence of instructions to the contrary, by giving his or her wireless number to the person initiating the autodialed or prerecorded call.").

³² The Commission's denial of the Petition may not seem significant, but Petitioners likely will appeal the denial thereby triggering a drawn-out battle in the courts and uncertainty in the business community. Delaying the denial until after other significant regulatory uncertainties have been resolved will reduce the impact of the uncertainty created by such an appeal. See *WWHT, Inc. v. Federal Communication Commission*, 656 F.2d 807, 814 (D.C. Cir. June 18, 1981) ("While we agree that judicial intrusion into an agency's exercise of discretion in the discharge of its essentially legislative rulemaking functions should be severely circumscribed, we reject the suggestion that agency denials of requests for rulemaking are exempt from judicial review.").

³³ On January 30, 2017, President Trump directed all federal agencies to identify two existing regulations to be repealed for each new regulations published for notice and comment. E.O. 13771, § 2(a). In so doing, he identified that "it is the policy of the executive branch to be prudent and financially responsible in the expenditure of funds" including "the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations." E.O. 13771, § 1. President Trump reiterated his commitment to regulatory reform on Feb. 24, 2017 by directing each agency to appoint a Regulatory Reform Officer to oversee the implementation of regulatory

Respectfully submitted,

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reform initiatives. E.O. 13777, § 2. The Commission should also deny the Petition out of respect to the President's policy of relieving regulatory burdens on commerce.